

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF MISSISSIPPI

3 UNITED STATES OF AMERICA,)
4)
5 Plaintiff,)
6 vs.)
7 Defendant.)

8 CASE NO. 4:15CR130

9 ABORTED CHANGE OF PLEA AS TO COUNT 1 OF THE INDICTMENT
10 BEFORE DISTRICT JUDGE MICHAEL P. MILLS
11 THURSDAY, APRIL 28, 2016; 11:05 A.M.
12 OXFORD, MISSISSIPPI

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28 Proceedings recorded by mechanical stenography, transcript
29 produced by computer.

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1 (CALL TO ORDER OF THE COURT)

2 THE COURT: Mrs. Pennebaker, would you call the
3 docket.

4 THE COURTRoom DEPUTY: Court calls Cause No.

5 4:15CR130, United States of America v. Andre Kirkland. This is
6 a change of plea as to Count 1 of the indictment.

7 THE COURT: All right. Who speaks for the
8 Government?

9 MR. FULCHER: Your Honor, I do, Dave Fulcher, U.S.
10 Attorney's Office, Southern District of Mississippi; and I'm
11 appointed to handle this case for the Government today.

12 THE COURT: All right. Thank you.

13 Who speaks for the defense?

14 MR. PERCY: Roy Percy here for Andre Kirkland, Your
15 Honor; and Joyce Freeland is also co-counsel in this case.

16 THE COURT: And you have your client with you?

17 MR. PERCY: Yes, Your Honor.

18 THE COURT: We have anyone from probation?

19 MR. TOLLISON: Yes, sir, Your Honor, Greg Tollison.

20 THE COURT: Glad to have you.

21 Are you ready to proceed?

22 MR. PERCY: We are, Your Honor.

23 THE COURT: If you would come forward, please.

24 (PARTIES COMPLYING).

25 THE COURT: You want to administer the oath.

1 (OATH ADMINISTERED BY THE COURTROOM DEPUTY)

2 THE COURT: Mr. Kirkland, you understand that you're
3 now under oath; and, if you answer any of my questions falsely,
4 your answers may later be used against you in another
5 prosecution for perjury or making false statements?

6 THE DEFENDANT: Yes.

7 THE COURT: And I am told that you wish to enter a
8 plea of guilty to Count 1 of the indictment. Is that correct?

9 THE DEFENDANT: Yes.

10 THE COURT: Before taking your plea, there are a
11 number of questions I must ask you. If you do not understand
12 any of these questions or if, at any time, you wish to consult
13 with your attorney, you let me know.

14 THE DEFENDANT: Yes.

15 THE COURT: What is your full name?

16 THE DEFENDANT: Andre Kirkland.

17 THE COURT: How old are you?

18 THE DEFENDANT: Fifty-five.

19 THE COURT: How far did you go in school?

20 THE DEFENDANT: Associate in nursing.

21 THE COURT: Have you been treated recently for any
22 mental illness or addiction to narcotic drugs of any kind?

23 THE DEFENDANT: Just some mild depression.

24 THE COURT: All right. Are you currently under the
25 influence of any drug, medication, or alcoholic beverage?

1 THE DEFENDANT: No, sir.

2 THE COURT: Do you think you fully understand what is
3 happening here today?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Mr. Percy, have you talked with your
6 client today and earlier? I presume you have.

7 MR. PERCY: Yes, Your Honor.

8 THE COURT: Do you have any questions about his
9 competency to enter a plea at this time?

10 MR. PERCY: No, Your Honor.

11 THE COURT: Does the U.S. Attorney have any question
12 as to the defendant's competency to enter a plea?

13 MR. FULCHER: No, sir.

14 THE COURT: If you'd come up to the podium, please.

15 MR. FULCHER: Yes, sir.

16 THE COURT: Well, I find that Mr. Kirkland is
17 competent to enter a plea.

18 Have you received a copy of the indictment pending against
19 you in this case?

20 THE DEFENDANT: Yes.

21 THE COURT: Have you fully discussed those charges
22 and the case in general with Mr. Percy as your attorney?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Are you fully satisfied with the counsel,
25 representation, and advice given to you in this case by your

1 attorneys?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Has anyone attempted in any way to force
4 you to plead guilty?

5 THE DEFENDANT: No, sir.

6 THE COURT: Are you pleading guilty of your own free
7 will because you are guilty?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you understand that you have the right
10 to plead not guilty and to persist in that plea?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you understand, under the Constitution
13 and laws of the United States, you are entitled to a trial by
14 jury?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you understand that, at trial, you
17 would be presumed innocent; and the Government would be
18 required to prove you guilty beyond a reasonable doubt; and you
19 would not be required to prove your innocence?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Do you further understand that, in the
22 course of the trial, witnesses for the Government would have to
23 come into court and testify in your presence; your attorney
24 could cross-examine the witnesses for the Government; and he
25 could also call other witnesses to testify on your behalf?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Are you aware that if you wished to
3 testify yourself in your own defense you would have that right
4 to do so, but if you chose not to testify no inference or
5 suggestion of guilt would be drawn by you so choosing?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: If you plead guilty here today and if I
8 accept your plea, do you understand that you're going to waive
9 your right to trial and the other rights I just discussed with
10 you?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: That means there will not be a trial, and
13 I will enter a judgment of guilty; and I will sentence you on
14 the basis of your guilty plea after considering the Presentence
15 Report. Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Having discussed these rights with you,
18 is it still your desire to plead guilty to Count 1 of the
19 indictment?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: What is he charged with in Count 1,
22 Mr. Fulcher?

23 MR. FULCHER: Your Honor, the defendant is charged
24 with conspiracy to defraud the Government through a health care
25 benefit program, specifically Medicare and Medicaid.

1 THE COURT: All right.

2 Are you aware that that's what you're charged with?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Before you could be found guilty of this
5 charge, the Government would have to prove certain elements
6 against you beyond a reasonable doubt.

7 Mr. Fulcher, will you read these elements into the record,
8 please?

9 MR. FULCHER: Yes, Your Honor. Your Honor, the
10 defendant is charged with conspiracy to commit the offense of
11 health care fraud in violation of Title 18, United States Code
12 1349 and 1347.

13 The elements of the offense that would have to be proven
14 would be as follows: First, that two or more persons, in some
15 way or manner, agreed to try and accomplish a common and
16 unlawful plan to commit health care fraud as charged in the
17 indictment; and that the defendant knew the unlawful purpose of
18 the plan and willfully joined it.

19 The offense elements for 1347 -- Title 18, United States
20 Code, Section 1347 are as follows: First, that the defendant
21 knowingly and willfully executed, or attempted to execute, a
22 scheme or artifice to defraud a health care benefit program; or
23 that the defendant knowingly and willfully executed, or
24 attempted to execute, a scheme or artifice to obtain money and
25 property from a health care benefit program by means of false

1 and fraudulent pretenses, representations, or promises as
2 charged in the indictment; and that the defendant acted
3 willfully, that is, with the intent to defraud a health care
4 benefit program.

5 And, as the Court knows, and as is set forth in -- in the
6 definitions within the statute, Medicare and Medicaid are
7 programs that are determined to be health care benefit programs
8 as defined under these two respective statutes. Those are the
9 elements that the Government would be required to prove with
10 regard to Count 1.

11 THE COURT: All right. Thank you.

12 Do you have any questions about this charge?

13 THE DEFENDANT: No, sir.

14 THE COURT: What are the maximum penalties he could
15 be sentenced to, Mr. Fulcher?

16 MR. FULCHER: Your Honor, the -- if I could have one
17 second. Your Honor, the maximum penalties for this offense are
18 not more than 20 years and a \$250,000 fine per count;
19 supervised release would be no more than 3 years; and a special
20 assessment of \$100.

21 THE COURT: All right. Do you understand these
22 penalties?

23 THE DEFENDANT: Yes.

24 MR. PERCY: Your Honor, if I may, is that not more
25 than 20 or not more than 10? My notice of penalties says not

1 more than 10 years for Count 1. I could be mistaken about
2 that.

3 MR. FULCHER: And I could be mistaken as well.

4 MR. PERCY: The not more than 20 years, Your Honor,
5 looks to be if there is bodily injury that resulted from the
6 offense; and that's not alleged in this case, so I believe the
7 maximum is 10 years on Count 1.

8 THE COURT: All right. Do you agree with that?

9 MR. FULCHER: I do, Your Honor.

10 THE COURT: All right. Do you understand these
11 penalties?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Has there been a plea agreement entered
14 into?

15 MR. PERCY: Yes, Your Honor.

16 THE COURT: Mr. Fulcher, do you have a plea
17 agreement?

18 MR. FULCHER: We do, Your Honor.

19 THE COURT: Well, let me look at it.

20 MR. FULCHER: Yes, sir.

21 THE COURT: If I understand this plea agreement, you
22 have a supplement which restrains the Court to a sentence of
23 probation. Is that correct?

24 MR. FULCHER: That is correct, Your Honor.

25 THE COURT: Is that correct, Mr. Percy?

1 MR. PERCY: Yes, Your Honor.

2 THE COURT: Well, I'm not going to accept that.

3 So -- I'm not going to accept that. And when is it set for
4 trial?

5 MR. PERCY: May the 9th I believe, Your Honor.

6 THE COURTROOM DEPUTY: Yes, sir.

7 THE COURT: Okay. Well, I'm not going to accept that
8 in this case. I just think that is entirely inappropriate, and
9 we'll go forward from there. If you come forward with a
10 different plea agreement, you can let me know. Otherwise --

11 MR. PERCY: Your Honor, may we cite the reasons for
12 the --

13 THE COURT: Yes.

14 MR. PERCY: -- for that offer? And I'll ask the
15 prosecutor to correct me if I'm wrong. Mr. Kirkland is a
16 cancer patient and is undergoing chemotherapy now but has had
17 not a good diagnosis. I think that's one reason that the
18 United States made this offer.

19 Another reason is that the star witness for the Government
20 had a heart attack and died. That's not to say that they can't
21 try this case and can't get a conviction, but I have -- at
22 least I, personally -- and they haven't represented this to me;
23 but I believe that plays a role in the plea agreement, Your
24 Honor. It's the health condition of the defendant and the new
25 posture of the case for the prosecution.

1 THE COURT: Well, you have anything to say?

2 MR. FULCHER: No, sir.

3 THE COURT: All right. Well, I had seen a number of
4 these cases in the last several months. Are these under -- is
5 there a region of the Federal Government that oversees all of
6 these hospices?

7 MR. FULCHER: Your Honor, quite honestly, I'm not
8 sure if there is a specific region. I know that we work --

9 THE COURT: Seems like it was called the Atlanta
10 region at one time.

11 MR. FULCHER: Yes, sir.

12 THE COURT: But I have simply been astonished at the
13 amount of money that has been wasted from the Federal
14 Government in the Mississippi Delta under a cynical and greedy
15 scheme to take advantage of poor people and to use services
16 that were meant for people that really needed those services
17 and to accept a sentence of probation in this case, I think,
18 would be a disservice to the citizens of the United States; so
19 we will go forward with a trial.

20 MR. PERCY: Your Honor, would the Court entertain a
21 request for a continuance of the trial in light of the fact
22 that we've been preparing for a plea up to this point?

23 THE COURT: Well, if you file the -- you go ahead and
24 file it, and I will. I'll certainly give you time to get ready
25 for trial, but we're going to try it pretty soon.

1 MR. FULCHER: Yes, sir.

2 THE COURT: Anything else?

3 MR. FULCHER: Your Honor, if I may also add, I would

4 likewise join in that request, just so the Court will know.

5 And I have only recently been appointed into this case as a

6 result of AUSA Scott Gilbert leaving our office; so I,

7 likewise, would need -- would need time.

THE COURT: Well, we'll give you a couple of weeks.

9 All right. Anything else?

10 MR. PERCY: No, Your Honor.

11 THE COURT: The Court will be in recess.

12 MR. PERCY: Thank you.

13 MR. FULCHER: Thank you.

14 (THE HEARING ENDED AT 11:14 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

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4 I, Rita Davis Young, Federal Official Realtime
5 Court Reporter, in and for the United States District Court for
6 the Northern District of Mississippi, do hereby certify that
7 pursuant to Section 753, Title 28, United States Code that the
8 foregoing is a true and correct transcript of the
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2 of the United States.

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/s/ Rita Davis Young

RITA DAVIS YOUNG, FCRR, RPR, CSR #1626
Federal Official Court Reporter